MALAYAN BANKING BHD.

v.

CHUA KENG LENG

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[CIVIL SUIT NO. 22-2 OF 1991]
30 SEPTEMBER 1991

CIVIL PROCEDURE: *Rules relating to pleadings - Duty of parties - Mere denial - Effect of - Specific pleading of facts - Summary judgment - Whether there was a delay in filing - Whether affidavits averred to by solicitors were hearsay evidence - Whether solicitors had been properly authorised to act for bank - Ostensible authority - Rules of the High Court 1980, O. 14, O. 18 rr. 8(1), 13, O. 56 r. 1(1).*

The defendant C, a sole proprietor of a business, applied for an overdraft facility from the plaintiff bank MBB. The said overdraft was approved subject to the security of a legal charge over a piece of property in the name of one L. The said charge was executed on 25 August 1989 by Y for MBB as its attorney. C signed for L as his attorney.

On 8 October 1990 the donor of C's power of attorney disputed the authenticity of the power and the purported title deed. C failed to reply to a demand made by MBB and an action was commenced to recover the monies due. MBB proceeded to apply for summary judgment.

Preliminary objections were raised as to:

(1) the authority given by MBB to LPL, an advocate and solicitor in the firm of MBB's solicitors, to sign the affidavit in support of MBB and

(2) the authority given by MBB to its solicitors to act as solicitors for them.

The Senior Assistant registrar (SAR) overruled both preliminary objections, but instead of proceeding directly with the merits, she stayed the matter whilst C proceeded to file this appeal.

Held:

[1] The basic objects of the rules relating to pleadings especially O. 18 r. 13 of the Rules of the High Court 1980 (RHC), is to narrow down the parties to definite issues and to diminish expense and delay. Parties ought to admit facts as to which there is no controversy. A defendant should not deny plain and acknowledged facts which is neither in his interest nor in his power to disprove. In an action for a debt a mere denial of the debt is wholly inadmissible. By O. 18 r. 8(1) a defence must specifically plead facts which allegedly makes a claim not maintainable or which if not specifically pleaded may take an opponent by surprise.

[2] The SAR should have proceeded to dispose of the matter before her on the merits. Order 56 of the RHC 1980 which permits an appeal cannot apply to the ruling she made as the matter was not disposed of. To be appealable the judgment, order or decision must dispose of the particular matter the Registrar was called upon to try and not merely peripheral thereto. It would have been otherwise if she had decided the preliminary points in favour of the defendant because that would have effectively precluded the plaintiff from proceeding further.

[3] The authority of MBB's solicitors was not challenged at any stage until the morning of the hearing. In this case, it was manifestly obvious that MBB's solicitors were acting well within their ostensible authority in sending the demand letter and filing proceedings.

[4] The facts on which the claim is based cannot be seriously challenged and it is therefore evidence that there is no defence to the claim.

[Further arguments required on certain points.]

Cases referred to:
Re L.Y. Swee & Co. Ltd., Khoo Leong Kee v. L.Y. Swee & Co. ltd. [1968] 2 MLJ 104 ***(cit)***
United Investment & Finance Ltd. v. Tee Chin Yong & Ors. [1967] 1 MLJ 31 ***(cit)***
Sarawak Building Supplies Sdn. Bhd. v. Director of Forests & Ors. [1991] 1 MLJ 211 ***(cit)***
Million Group Credit Sdn. Bhd. v. Lee Shoo Koon & Ors. [1985] CLJ (Rep) 575 ***(cit)***
Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd. [1986] 1 MLJ 348 ***(cit)***
Myers v. Elman [1939] 4 All ER 484; [1940] AC 282 ***(cit)***
Bank Bumiputra Malaysia Bhd. v. Esah bt. Abdul Ghani [1986] 1 MLJ ***(cit)***

Legislation referred to:
Evidence Act 1950, s. 114illus.(e)
Legal Profession (Practice & Etiquette) Rules 1978, r. 12
Rules of the High Court 1980, O. 14, O. 18 r. 13, O. 18 r. 8(1), O. 41 r. 5, O. 56 r. 1(1)

Other sources referred to:
Commentary to the Supreme Court Practice 1979,
Mallal's Supreme Court Practice, 2nd Edn., Vol. 1,
Civil Litigation, 1st Edn., p. 120, 121 & 148 by John O'Hare & Robert N. Hill
Odgers' Principles of Pleading & Practice in the High Court of Justice, 22nd Edn.
Halsbury's Laws of England, Vol. 13, 4th Edn.,

For the plaintiff - Wu Tern Yue; M/s. K.C. Yap Kamaludin & Partners
For the defendant - K. Ranjit Singh; M/s. Ranjit Singh & Partners

JUDGMENT

Mahadev Shankar J:

This appeal arises out of an application by the plaintiff (the bank) for summary judgment against the defendant (Chua) for payment of the amount due on an overdraft with interest thereon.

The affidavits filed in support of the application establishes the following assertions made by the plaintiff.

Chua is female. She is the sole proprietor of a business styled New Fortune Enterprise. Her residential address at all material times was at No. 18 Jalan 3 Kaw. 6, Off Jalan Raya Barat Klang. The business address was at 157-A Persiaran Raja Muda Musa 42000 Pelabuhan Klang.

Chua applied to the bank under her business name and address for an overdraft for RM200,000. On 19 August 1989 the bank sent her a letter approving the overdraft subject to the security of 1st legal charge over Geran 7598 Lot 40392 registered in the name of Lim Seng Chee. This letter required her acceptance which is evidenced by her signature under her business chop. Mr. Yoong Tau Pin signed the letter as manager of the Klang Branch of the Bank.

The charge was executed on 25 August 1989 by Yoong Tau Pin for the bank as its Attorney. Chua signed for Lim Seng Chee as his Attorney. A solicitor KC Yap witnessed both signatures.

Since the charge was duly registered on 28 August 1989 I must infer that the title deed and the powers of attorney under which the documents were signed were duly deposited with the Registering Authority. The Evidence Act, s. 114(e) presumes in the absence of evidence to the contrary that all official acts were duly and regularly performed.

I have noted that whereas the charge documents gave Chua's business address, the bank statement gave her house address. This bank statement shows that the full overdraft facility was utilised by Chua.

As at 25 June 1990 the amount was RM199,689.11. By 8 October 1990 it appears that the donor of Chua's purported power of attorney disputed the authenticity both of the power and the purported title deed. On that date the bank's solicitors, KC Yap Kamaludin & Partners sent Chua a formal demand letter to pay the aforesaid sum. She did not.

So the bank filed a writ and statement of claim on 5 January 1991. On 9 March 1991 Chua filed a statement of defence by her solicitors and served the same on 15 March 1991.

In view of what is about to follow I feel obliged to restate the basic objects of the rules relating to pleadings especially O. 18 r. 13 of the Rules of the High Court. By narrowing down the parties to definite issues we aim to diminish expense and delay. Parties ought to admit facts as to which there is no controversy. A defendant should not deny plain and acknowledged facts which it is neither in his interest nor in his power to disprove. In an action for a debt a mere denial of the debt is wholly inadmissible. Authority for these propositions can be found in the *Commentary to the Supreme Court Practice 1979* at p. 302. By O. 18 r. 8(1) a defence must specifically plead facts which allegedly makes a claim not maintainable or which if not specifically pleaded may take an opponent by surprise.

In para. 1 of the statement of claim the bank averred it was a bank incorporated in Malaysia with a branch at its given address in Klang. In para. 1 of the defence, Chua denied this and put the bank to strict proof.

In para. 2 the bank set out Chua's addresses and her connection with New Fortune Enterprise. This the defendant admitted.

In para. 3 the bank pleaded the letter dated 19 August 1989 which approved the overdraft and which the defendant signed. But in para. 3 of the defence she denied this letter and put the bank to strict proof. She further denied that she had received this letter or that she had signed it. It is to be emphasised that she did not contend that the signature on the letter was not hers, or that it had been made by someone else.

In para. 4 the bank pleaded particulars of the cheque securing the overdraft. In para. 4 of the defence, Chua denied the plaintiff's assertion, and claimed that the plaintiff's claim was in contravention of the law and the facts. No particulars were given of the law or facts in question.

Paragraph 5 of the defence was an alternative defence that if in fact the land had been charged the bank should first obtain an order for the sale thereof before making a claim against the plaintiff.

Paragraph 5 of the statement of claim set out the terms of the overdraft which were contained in the letter of acceptance dated 19 August 1989. In para. 6 the bank averred it had given the defendant the RM200,000.

In para. 6 of the defence Chua denied the terms set out and denied receipt of the RM200,000. She did not say if in fact she had agreed to some other terms or had in fact received some other sums or at all.

In para. 7 the bank averred that Chua had breached her obligations by charging the land under a power of attorney disputed by the landowner or alternatively getting the overdraft facility by unsatisfactory means. This the defendant merely denied and put the bank to strict proof. No facts were pleaded to show that the power of attorney was lawfully given.

In para. 8 of the statement of claim the bank referred to the letter of demand of their solicitors dated 8 October 1990 which terminated the facility. The defendant denied receipt of the letter and put the plaintiff to strict proof.

This defence was filed on 9 March 1991. It is not clear when it was served on the bank's solicitors, who filed an application for summary judgment on 24 April 1991. It was supported by an affidavit of Low Peck Lim an advocate and solicitor in the firm of K.C. Yap Kamaludin and Partners who were the bank's solicitors at all material times.

The matter was fixed for hearing on 18 June 1991. By that date no affidavit to show cause had been filed by the defendant. The matter was adjourned to 22 July 1991.

On 27 June 1991 a second affidavit was filed by the bank. It was deposed to by Yoong Tau Pin the same branch manager who had signed the approval letter for the loan and the charge. In this affidavit he exhibited the bank's statement of the defendant and the A.R. Card and the Certificate of posting to prove that the demand letter had been sent to the defendant at both her business and her residential addresses, and the result of the search at the business registry.

On 17 July 1991 the bank's solicitors filed a third affidavit by Low Peck Lim reiterating the facts stated in his earlier affidavit.

On 19 July 1991 Chua filed her affidavit in answer, and probably because of late service the hearing on 22 July 1991 was adjourned to 1 August 1991.

The material portions of this affidavit for our present purposes are that since the defendant had filed her defence on 9 March 1991 the bank's application for summary judgment on 24 April 1991 was too late, could not be made without leave of the Court and should be dismissed on grounds of delay. Next it was asserted that the affidavits filed in support of the Bank's application had been made by its solicitors and was therefore hearsay evidence and therefore inadmissible. The affidavits of Yoong Tau Pin was alleged to be inadmissible because it merely supported the solicitors' affidavit.

It was also asserted that because the bank's solicitors had been involved in the preparation of the charge documents they could not act in this matter because they could be called as witnesses and had acted for her.

Next it was deposed to by the defendant that the plaintiff's claim was in contravention of the facts and the law because the overdraft granted to her had been secured by the charge of a piece of land which the bank was obliged to sell first before it could establish if anything was owed by her.

The affidavit also denied the receipt of the notice of demand.

In response the bank's solicitors filed a fourth affidavit. This was affirmed by Yoong Tau Pin. In it he once again deposed to the fact that Low Peck Lim had sworn and filed his affidavit with the full authority of the bank and reaffirmed the facts he had deposed to. He also deposed to the fact that the bank's solicitors had not acted for Chua at all but that by agreement the bank's solicitors costs was paid by the defendant.

The case was now fixed for hearing in 1 August 1991. The day before the hearing the plaintiff's solicitors received a letter from the defendant's solicitors that they were going to take two preliminary objections on a point of law *viz*:

(a) Authority given by the plaintiff to Mr. Low Peck Lim to sign the affidavit in support of the plaintiff.

(b) Authority given by the plaintiff to yourselves to act as solicitors for them.

The Senior Assistant Registrar overruled both preliminary objection. But having done so instead of proceeding directly to deal with the merits she effectively stayed the matter whilst the defendant proceeded to file an appeal.

With respect to all concerned, I hold that the Senior Assistant Registrar should forthwith have proceeded to dispose of the matter before her on the merits. The ruling which she made did not dispose of the matter she had been called upon to try. Order 56 r. 1(1) which permits an appeal from any judgment order or decision of the Registrar cannot in my view apply to the ruling she made, any more than a ruling as to which party should begin, or whether some particular piece of evidence was admissible or otherwise. To be appealable the judgment order or decision must dispose of the particular matter the Registrar was called upon to try and not merely peripheral thereto. It would have been otherwise if she had decided the preliminary points in favour of the defendant because that would have effectively precluded the plaintiff from proceeding further.

Before me defendant's Counsel submitted that the bank's solicitors could not act in this case because no proper proof had been furnished that they had been properly authorised to act. He referred to *Re L.Y. Swee & Co. Ltd., Khoo Leong Kee v. L.Y. Swee & Co. Ltd.* [1968] 2 MLJ 104. In this case the person who questioned the authority of the purported Counsel for the company held 96.4 per cent of the company's equity, had not herself concurred in the appointment, and was able to show that the purported resolution appointing the Counsel so styled was void because it could not be perfected. The next case was *United Investment & Finance Ltd. v. Tee Chin Yong & Ors.* [1967] 1 MLJ 31. Once again this was an internal squabble between shareholders and the Court held on the evidence that the purported resolution allegedly authorising the managing director to commence the action was void. (See p. 36). So it followed that the actions had been commenced without the authority of the plaintiff company. The third case cited was *Sarawak Building Supplies Sdn. Bhd. v. Director of Forests & Ors.* [1991] 1 MLJ 211. This time it was a third party who challenged but it was clear that there was no quorum for the meeting which passed the resolution to commence the legal proceedings in question.

Of course the authority of solicitors to act for a Company can be challenged at any stage and the burden of proving proper institution rest with the plaintiff. But the challenge must be backed with some credible ammunition, not just blank cartridges.

In the present case the bank's solicitors authority was not challenged at any stage until the morning of the hearing. By then it was manifestly obvious that they were acting well within their ostensible authority in sending the demand letter and filing proceedings. There is nothing in Chua's defence denying their authority, or any grounds therefor in her affidavit. Furthermore there was sworn testimony from Yoong Tau Pin that the bank's solicitors had been empowered to act for the plaintiff and that Low Peck Lim had been specifically instructed to conduct the matter for the Bank.

In *Million Group Credit Sdn. bhd. v. Lee Shoo Koon & Ors.* [1985] CLJ (Rep) 575 at p. 578 I held that it was undesirable for solicitors to affirm and file contentious affidavits in matters in which they are themselves appearing because they should not at the same time be witnesses of material and disputed questions of facts. This was followed by Y.A. Edgar Joseph J in *Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1986] 1 MLJ 348.

These two decisions were relied upon to preclude the legitimacy of Low Peck Lim's affidavits. In addition it was contended that his averments were hearsay. Affidavits in support of O. 14 applications it was argued, had to be made by persons having personal knowledge of the matter.

Encik Wu of Counsel for the plaintiff referred me to Mallal's Supreme Court Practice 2nd Edn. Vol. 1 para. 14/2/1, 14/2/7 and the Rules of the High Court O. 41 r. 5 all of which are ample authority for the proposition that an O. 14 application can be supported by the plaintiff's solicitor as a responsible person who can swear positively to the facts verifying the cause of action and the amount claimed. The crux of the matter here is that the facts on which the claim is based cannot be seriously challenged and it is therefore evident that there is no defence to the claim.

Consequently I am firmly of the view that the preliminary points taken were devoid of merit and were correctly overruled.

An appeal is by way of rehearing and I must do now in the interest of justice what the Senior Assistant Registrar should have done.

In light of the comments I have made I invite the defendant to show cause why summary judgment should not be entered against her, and what action, if any should be taken by the Court as regards the form and content of the pleadings of the defence and affidavits filed by the defendant in this case. I would invite the attention of Counsel in this case to the following authorities I have looked at *viz*:

(1) *Civil Litigation* (1st Edn.,) by John O; Hare and Robert N. Hill pp. 120, 121 and 148.

(2) *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice* (22nd Edn.,) pp. 134, 135.

(3) Rule 12 of the Legal Profession (Practice & Etiquette) Rules 1978.

With respect to the position of the defendant's Counsel in this case let it be said for him straightaway that there is a widely held belief, which is still taught in some schools that there is the defendant's right to deny everything that the plaintiff has said in his pleadings so as to force him to prove his case to the hilt.

The law's delay today however have become so accute as to put the viability of our legal system at risk. Are we therefore not entitled to ask if the duty of a solicitor with regard to the pleading and affidavits he files are no less onerous than the duty of a solicitor when filing, say an affidavit of documents. (See remarks of Lord Wright in *Myers v. Elman* [1939] 4 All ER 484 at p. 511 and p. 513; also [1940] AC 282 and Vol. 123 *Halsbury's Laws of England* 4th Edn., para. 45 and 46.) Is this Court not entitled to ask if it should direct a reappraisal of our approach to pleadings so that solicitors as officers of Court do not cause or permit issues in pleadings unless there are compelling reasons why they should be tried?

I require to be addressd specifically on the following points:

(1) Whether it was permissible or proper in all the circumstances of this case for the defence to deny:

(a) that the plaintiff was a bank;

(b) that the defendant had signed the loan offer letter and the charge

and

(2) Whether in the light of cl. 28(g) of the charge document and the decision of the Supreme Court in *Bank Bumiputra Malaysia Bhd. v. Esah bt. Abdul Ghani* [1986] 1 MLJ 16 at p. 18 it was open to the defence to plead that the plaintiff was not entitled to bring this action in the first place.

If the answers to these questions are in the negative, I require to be addressed on the sanctions this Court should impose in addition to giving judgment for the plaintiff.

Costs will be reserved in the meanwhile.

Also found at [1991] 3 CLJ 2522